

IN THE MATTER OF THE ARBITRATION BETWEEN:

**Law Enforcement Labor Services, Inc.,
Local 141
(Deputy Ryan Carey)**

And

OPINION AND AWARD

Clay County, Minnesota

BMS Case No. 15-PA-0589

**Richard A. Beens
Arbitrator
1314 Westwood Hills Rd.
St. Louis Park, MN 55426**

APPEARANCES

For the Union:

**Isaac Kaufman, Esq.
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For the Employer:

**Michael T. Rengel, Esq.
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**Date of Award
August 26, 2015**

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between Law Enforcement Labor Services, Inc. Local 141 (“Union”) and Clay County, Minnesota (“Employer”). Ryan Carey (“Grievant”) is employed as a deputy sheriff by Clay County and is a member of the Union.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on July 14, 2015 in Moorhead, Minnesota. Both parties were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written closing arguments were submitted simultaneously on August 21, 2015. The record was then closed and the matter deemed submitted.

ISSUES

1. *Does the Employer’s refusal to assign Deputy Ryan Carey to a canine handler position constitute an arbitrable grievance?*
2. *Did Clay County violate the Collective Bargaining Agreement by rejecting Deputy Ryan Carey’s application for assignment as a Canine Handler in December, 2014? If so, what is the proper remedy?*

FACTUAL BACKGROUND

The Employer, Clay County, is a political subdivision of the State of Minnesota. The Clay County Sheriff’s office employs 36 sworn officers working in five principal positions; patrol, investigator, court security, civil process, and warrants/transport.²

Grievant has been employed as a Deputy Sheriff in Clay County since 2001. He

¹ Union Exhibits 1 and 2.

² County Exhibit 4.

was a patrol officer from the time of his hire to July 25, 2012. From 2007 to July, 2012, he also worked as canine handler.

In mid-June, 2012, Grievant was involved in an off-duty incident at an Eden Prairie, Minnesota hotel involving canine officers from several police departments. Following a Clay County Sheriff's Department Internal Affairs investigation, Carey was terminated by the Employer on July 25, 2012.³ Among other allegations, he was charged with making dishonest statements in the course of the IA investigation.⁴

Carey grieved the termination. Following a hearing, an arbitrator found the allegations were not proven, sustained his grievance and ordered that Grievant be reinstated with full back pay and all benefits.⁵ However, upon reinstatement, Grievant was removed from patrol and dog handler duties and assigned to court security. When the Union and Employer again clashed over the circumstances of reinstatement,⁶ the Arbitrator ultimately determined the Employer had not violated the reinstatement order.⁷ His ruling stated,

"In the absence of contractual language that creates procedures for bidding on job assignments or a well-established bidding practice, management has the right to assign a Deputy to any road or courthouse position. Directing reinstatement to a specific assignment in the case is beyond my jurisdiction."

The arbitrator also noted, *"...it appears the reinstatement does not conformed (sic) fully with the "spirit" of the arbitration award but does follow the "letter" of the award."*⁸ Grievant has served in the court security position to the present time.

³ Union Exhibits 6.

⁴ Union Exhibit 5.

⁵ Union Exhibit 7. *Clay County Sheriff's Department and LELS*, BMS Case No. 13-PA-0118 (March 16, 2013) (Lundberg, Arbitrator).

⁶ Union Exhibits 8 and 9.

⁷ Union Exhibit 10.

⁸ Ibid.

Since Grievant's return to work on April 1, 2013 and the date of the present grievance, December 29, 2014, a number of intra-departmental transfer openings arose in the Sheriff's Office, six for patrol officer positions and one for patrol officer/canine handler. Grievant applied for five of the patrol officer position and was rejected each time. None of those rejections were grieved.

A memorandum for "*Secondary Job Assignment -- Canine Handler*" was posted on November 25, 2014.⁹ Grievant forwarded a letter of interest in the position on December 7, 2014.¹⁰ His application contained all the information required in the posting. One other deputy, Corby Nelson, also applied to be a canine handler.¹¹ Grievant had been a full time deputy since, 2001, Nelson since 2012. Grievant had specialized dog handling training, had worked as a canine officer for 6 years, and had received numerous awards for his work in the field.¹² Nelson had no canine handling training or experience.¹³ Nevertheless, Nelson was announced as the new canine handler on December 19, 2014.

Deputy Carey grieved the Sheriff's decision 10 days later, arguing that Article 7 of the CBA had been violated in passing him over for a far less senior and experience candidate.¹⁴

The Employer's primary argument is that a secondary work assignment is not grievable under the provisions of the CBA. However, should it be found arbitrable, a parade of Employer witnesses set forth a number of reasons why Grievant was not

⁹ County Exhibit 6.

¹⁰ Union Exhibit 13.

¹¹ Union Exhibit 14.

¹² Union Exhibit 13.

¹³ Union Exhibit 14.

¹⁴ Union Exhibit 3.

appointed to the canine handler position. These included multiple questions about Grievant's canine handling skills -- questions not supported by his last performance appraisal prior to his 2012 termination.¹⁵ Additionally, the Employer contends appointment of Grievant to a position that would result in his testifying in criminal cases is problematic because it presents a Brady-Giglio issue.¹⁶ This argument is advanced, despite a specific arbitrator's finding that allegations of Grievant's dishonesty were not proven.¹⁷

APPLICABLE CONTRACT PROVISIONS¹⁸

Article 5. Employer Authority

- 5.1 *It is recognized that, except as expressly stated herein, the Employer will retain whatever rights and authority are necessary for it to operate and direct the affairs of Clay County in all of its various aspects including, but not limited to , the right to direct the working forces; to plan, direct and control all the operations and services of the County; to determine the methods, means, organization and number of personnel by which such operations and serviced are to be conducted; to assign and transfer employees; to schedule working hours and to assign overtime; to hire, promote, demote, suspend, discipline, discharge or relieve employees due to lack of work or other legitimate reasons; to make and enforce rules and regulations; and to change or eliminate existing methods, equipment or facilities.*
- 5.2 *Any term or condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish or eliminate.*

¹⁵ Union Exhibit 4.

¹⁶ This reference stems from two U.S. Supreme Court cases, *Brady v. U.S.*, 373 U.S. 83 (1963) and *Giglio v. U.S.*, 405 U.S. 150 (1972). In short, these cases obligate a prosecutor to disclose to defendants when a policeman has a sustained record of knowingly lying in an official capacity.

¹⁷ Union Exhibit 7.

¹⁸ Union Exhibit 1 and Employer Exhibit 2 is the CBA in effect from January 1, 2015 to December 31, 2017. Union Exhibit 2 and Employer Exhibit 1 is the CBA in effect from January 1, 2012 to December 31, 2014. However the provision applicable to this grievance are identical in both CBAs.

Article 6. Grievance Procedure

6.1 ***Definition of a Grievance:*** *A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.*

....

6.5 *Arbitrator's Authority*

A. The arbitrator will have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted.

B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way, the application of laws, rules or regulations have the force and effect of law....

Article 7. Seniority

7.1 *Seniority*

Types of Seniority: There shall be three (3) types of seniority established by the Agreement:

Service Seniority - The total full-time length of continuous service with Clay County.

Departmental Seniority - the total full-time length of continuous service with in the Clay County Sheriff's Department.

Classification Seniority - The total full-time length of service within a job classification.

7.2 *Posting Openings*

Job Classification Opening: *for a period of seven (7) days prior to the placement of any public notice concerning a vacancy or opening within a job classification, the Employer shall post, in a conspicuous place, in the department, notice of the position to be filled. Such notice shall state the type of work, the place of work, rate of pay, and normal hours to be worked.*

Work Assignment Opening: For a period of seven (7) days prior to filling an open work assignment within a job classification, the Employer shall post, in a conspicuous place, in the department, notice of the position to be filled. Such notice shall state the type of work, the place of work, rate of pay, and normal working hours

7.2.1 The Employer is committed to hiring the most qualified candidate for county service. When all other qualifications are equal, the Employer shall select the applicant with the greater department seniority for an opening in a job classification. Assignments will be based upon qualifications, employee preferences, and the most efficient use of personnel and resources.

7.2.2 Testing: Approved testing procedures may be used in measuring an Employee's qualifications under this Article.

7.2.3 Assignment Preferences: The Employer shall provide an opportunity for all eligible full-time, permanent employees to express their preference for assignment to positions (i.e. investigations, patrol, civil process, warrants, courthouse security) within their job classification. Such preference shall be expressed by a written letter to the Employer by December 1 or each year stating reasons and qualifications for the assignment. The Employer shall compile and maintain records of employee assignment preference and shall update these records at least once each year. It will be each employee's responsibility to notify the Employer, in writing, if they wish to withdraw their name from consideration for any particular reassignment.

7.2.4 Except as noted above, nothing in this section shall be construed to limit the Employer's right to assign or reassign employees to duties within a job classification.

7.3 Promotions

7.3.1 Promotions are defined as movement from one classification to another within the Deputy classification and includes an increase in compensation.

7.3.2

7.3.3 In all cases of promotion the Employer shall consider the following factors:

- A. *Length of service in the Department (department seniority) and*
- B. *Knowledge, training, ability, skill and efficiency in the position the person is seeking.*

OPINION AND AWARD

The instant case involves a contract interpretation in which the arbitrator is called upon to determine the meaning of some portion of the collective bargaining agreement between the parties. The arbitrator may refer to sources other than the collective bargaining agreement for enlightenment as to the meaning of various provisions of the contract. The essential role of the arbitrator, however, is to interpret the language of the collective bargaining agreement with a view to determining what the parties intended when they bargained for the disputed provisions of the agreement. Indeed, the validity of the award is dependent upon the arbitrator drawing the essence of the award from the plain language of the agreement. It is not for the arbitrator to fashion his or her own brand of workplace justice nor to add to or delete language from the agreement.

Is the Employer's refusal to assign Grievant to the canine handler position grievable?

Analysis of the CBA with respect to this issue is somewhat problematic in that the terms "*job classification*" and "*assignment*" are not specifically defined in the CBA.

Section 7.2.1 of the CBA invokes departmental seniority as a determining factor in filling openings in a "*job classification*." Article 7.3.1 refers to classifications "...within the Deputy classification." In other words, Grievant is initially classified as a Deputy Sheriff. The sub-classifications within Deputy Sheriff would refer to his rank, deputy, sergeant, lieutenant, etc.

Article 7.2.3, “*Assignment Preferences*,” specifically refers to the five positions in the Sheriff’s Department “(i.e. *investigations, patrol, civil process, warrants, courthouse security*)” tasks that are assigned within a job classification after giving some deference to an employee’s desires.

Based on the language used in the CBA and giving meaning to all the provisions, “job classification” must refer, in the first instance, to the overall classification of Deputy Sheriff. This would include all sworn peace officers other than the Sheriff. The various ranks, deputy, sergeant, lieutenant, commander, etc. would constitute several “job classifications” within the overall Deputy classification. Consequently, if this were a promotion grievance, the seniority provisions in the CBA might apply. Presumably, there are also other, non-sworn peace officer, job classifications within the Sheriff’s office, clerks, dispatcher, etc. Viewed in this light, the various CBA sections set out above make sense. Seniority is only a determining factor when moving from one job classification to another within the Sheriff’s office (Article 7.2.1) or when being considered for promotion from a lower to higher rank within the group of sworn officers (Article 7.3).

In the present case, Grievant was asking for a change of assignment from courthouse deputy to patrol/canine handler. Article 7.2.4 is directly on point and gives the Employer the exclusive right to assign positions and duties within the sub-classification of deputy. This interpretation is reinforced by Article 7.2.3 which allows deputies to express assignment preferences, but does not obligate the Employer to honor them. Further, seniority plays no role in assignment of positions or tasks within the sub-classification of deputy. Unfortunately for Grievant, the language of the CBA could not

be any clearer. His request is for a change of assignment, not a change in job classification. He is and remains classified as a deputy. However, his position in court security is an assignment left wholly to management's discretion. Article 7.2.4 gives the Employer an absolute, unfettered right to determine Grievant's assignment. As set out above, seniority plays no role in assignments under the clear language of this CBA.

Finally, as set out in Article 6.5 A., an arbitrator has no power to modify or ignore the plain language of a CBA provision. In order to find for Grievant on this issue, I would have to ignore the controlling language of Article 7.2.4. The CBA does not give an arbitrator that option or power. Based on the facts before me, I find this dispute is not substantively arbitrable.

With respect to the second issue, it is clear that, despite a prior arbitrator's ruling and redemptive behavior since, Grievant continues to suffer for perceived sins of the past. However, having determined that his case for assignment to the patrol/canine handler position, however meritorious it may be, is not arbitrable, analysis of the second issue becomes moot.

AWARD

The grievance is DENIED.

Dated: August 26, 2015

Richard A. Beens, Arbitrator